

## REVIEW AND SUMMARY OF THE GALLATIN RIVER OUTSTANDING RESOURCE WATER PETITION

### **Introduction**

On December 14, 2001, the Board of Environmental Review (BER) received a petition from American Wildlands, a conservation organization, requesting that the Gallatin River be classified as an Outstanding Resource Water (ORW). The petition requested that the classification apply from the Yellowstone National Park boundary downstream to the Spanish Creek confluence, a distance of approximately 45 miles. The purpose of this brief is to provide information to help the BER assess whether or not the required criteria for accepting the petition have been met by the applicant.

### Characteristics of an Outstanding Resource Water classification

By statute, ORW's presently include all surface waters in wilderness areas and the National Parks. Most Montana waters have specific water quality standards that protect designated beneficial uses. A water classified as an ORW by the BER would have the following additional protections against water quality decline:

- The Montana Department of Environmental Quality (MDEQ), which is the responsible state agency, could not grant an authorization to degrade the water quality. Under its current classification, an entity could apply for an authorization to degrade, which requires department approval and is appealable to the BER.
- MDEQ could not allow any new or increased point source discharge that would result in permanent changes in the water quality.

According to MCA 75-5-315(1), waters classified as ORW's are waters for which the state should prohibit, to the greatest extent practicable, changes to the existing quality of those waters.

### **The process for review of the petition**

The enclosed flow chart depicts the process that the BER and the department must use to consider and subsequently act on the petition, as required by MCA 75-5-316(3)(c). Department staff will walk the BER through this process at the meeting. First, the BER must decide whether to accept or deny the petition. This initial review is the BER's first duty, and the requirements below outline the issues the BER must consider. If the petition is accepted, and there is a potential for significant adverse impacts to social or economic values, the department embarks on an EIS process. When the Final EIS is complete, the BER takes public comment and holds a hearing, and then decides whether to deny the petition or initiate the rulemaking process. At the end of the rulemaking process, the BER may either adopt the rule designating the ORW or not adopt the rule. If the BER adopts the rule, the Legislature must finally approve the designation before it can take effect.

If the BER rejects the petition, written findings must be prepared that provide the rationale for the rejection.

### Acceptance or Denial of Petition-Requirements

The petition must contain certain elements in order to be accepted by the BER. It must:

- Contain sufficient credible information.
- Meet at least some of the criteria outlined in MCA 75-5-316(4)(a-f)
  - a. designated as wild and scenic
  - b. endangered or threatened species live in the water
  - c. has an outstanding recreational fishery
  - d. only source of water for a municipality or industry
  - e. only source of water domestic supply
  - f. other outstanding environmental or economic values

Not all of the criteria outlined in subsections 4(a-f) are required in order for the river to receive ORW designation, nor is it automatically granted that ORW designation will be given if one or more of the criteria are met.

The petition must also address the two additional points in (3)(c)(i & ii). These two subsections require that if the ORW petition is to be accepted, the ORW classification is:

- necessary to protect the outstanding resource and
- there is no other effective process available that will achieve this protection.

The petition addresses the criteria in 4(a), (c), and (f). Petitioners have made a reasonable case for the criteria in subsection 4(c) and (f). The reader is referred to pages 5-13 of the petition document for a discussion of how the Gallatin meets the criteria.

With respect to the two criteria in (3)(c)(i & ii), the board will need to deliberate on whether these criteria are met. An affirmative finding for the first requirement would require that the BER conclude that there is evidence provided in the petition that ORW designation is necessary, convenient, or conducive to protection of those characteristics in 4 (c) and (f). That is, that certain degrees of decline in water quality could damage the outstanding recreational fishery and the other social and economic values that the Gallatin represents. The BER does not have to be able to answer this question authoritatively; the EIS analysis would probably be required to do that.

An affirmative finding for the second criteria would require that the BER conclude that the current MPDES and nondegradation processes do not provide an effective means to provide this same protection. A graphic is included in your package that illustrates the relationship between existing water quality, significance thresholds for nondeg, and the ultimate water quality standard. This graphic will be used in the department's presentation before the BER to examine the protections afforded through existing processes and programs.

## Conclusion

In truth, even ORW's are not completely protected from *all* water quality degradation. Activities that are by state law categorically excluded as "non significant" degraders of water quality may still cause *some* changes in water quality. A series of "non significant" nonpoint source discharges to surface water could accumulate over a number of years and cause gradual declines in water quality even in an ORW. However, ORW's are protected from authorizations to degrade, a protection not granted to other high quality waters. Furthermore, MDEQ may not allow new or increased point source discharges that would result in a permanent change in the water quality of an ORW. This means that no permanent change in water quality, no matter how small, is allowed from new or increased point sources.

It is possible that there will be some individuals at the BER meeting that wish to express their views. A spokesperson from American Wildlands is also expected to address the BER.